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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1929. 30

No. 129

ROBERT H. LUCAS, Commissioner of Internal Revenue,
Petitioner.

against

SYBIL WHITEHOUSE,
Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TABLE OF CONTENTS.

	PAGE
Statement	1
Opinions Below	2
Statutes Involved	2
Argument	3
Point I	3
Point II	4
Point III	5
Point IV	6
Conclusion	6

Index to Authorities and Statutes.

Cases Cited:

Beatty v. Heiner, 276 U. S. 598 ..... 3, 5
Irwin v. Gavit, 268 U. S. 161 ..... 3, 5

Statutes:

Revenue Act of 1921; 42 Stat. 227:
Sec. 213(b)(3) 3, 4, 5
Sec. 219(a)(1)-(4) 4
Sec. 219(b)(c) 4
Sec. 219(d) 4, 5

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Statement.

By the Tenth Clause of the will of James Gordon Bennett who died May 14, 1918, Sybil Whitehouse was bequeathed a specific annuity of $5,000 (R. 44). The will did not direct or require the payment of the annuity out of income. It authorized the executors to sell, assign, convey, transfer, lease, mortgage or exchange any real or personal property left by the decedent or which might thereafter be acquired by the estate for the purpose of paying any legacy or legacies or for the payment of any annuity or annuities (R. 48). It further authorized, but did not require, the executors to retain and hold any personal property of which the testator died seised and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity

given by him (R. 48). Prior to the year 1921 this annuity was paid out of corpus and no tax was asserted by the Government. During the year 1921 the executors paid the annuity out of income (R. 20-21). The testator provided for the formation as soon as practicable of a charitable corporation to be named "The James Gordon Bennett Memorial Home for New York Journalists", the purpose of which was to provide a comfortable home or necessary pecuniary aid for persons employed by newspapers in the Borough of Manhattan, City of New York, who might be in need of such home or aid (R. 45). He bequeathed and devised the entire residue of his estate to the corporation (R. 48). The corporation was organized in May, 1919 (R. 41).

The petitioner, for the year 1921, asserted that the annuity of $5,000 paid to the respondent was taxable income, and an appeal from that determination was taken to the Board of Tax Appeals. The decision of the Board of Tax Appeals was favorable to the tax payer, whereupon the Government appealed to the Circuit Court of Appeals for the First Circuit which affirmed the Board of Tax Appeals and the Government then filed this petition for a writ of certiorari.

Opinions Below and Statutes Involved.

Citations of the findings of fact, the opinion of the Board of Tax Appeals and the opinion of the Circuit Court of Appeals are contained in the Government's brief. The pertinent statutes involved are likewise set out in the Government's brief, and, for the sake of brevity, are not here repeated.

ARGUMENT.

I.

The Government confuses the nature of the bequest and the source of its payment in 1921.

Both the Circuit Court of Appeals and the Board of Tax Appeals, after a thorough consideration of the authorities, held that the annuity in question was a bequest which constitutes a charge upon the corpus of the entire net estate of the decedent; that it was not a bequest of income such as was involved in *Irwin* v. *Gavit*, 268 U. S. 161, and *Beatty* v. *Heiner*, 276 U. S. 598; but was a bequest of a specific annual sum payable in any event during the life of the annuitant and, therefore, is excluded from gross income by Section 213(b)(3) of the 1921 Act.

The Government has not, either in its brief in support of its petition, nor in its briefs and arguments below, contended that the annuity is not a bequest or that it is a bequest of income. In fact, its statement of the "Question Presented" (Petition, p. 1) concedes that the payment of the annuity was "under a will which does not direct it to be paid out of income". Its sole argument, reduced to its essentials, is that because the annuity was paid out of income in 1921 it was therefore necessarily income taxable to the annuitant. We assert that the fund out of which the payment happened to be made did not determine its character in the hands of the legatee. Its character was determined by the terms of the will and the law of New York. Its payment out of income in 1921 was merely a coincidence as observed by the Circuit Court of Appeals and was also done as a matter of convenience and expediency but in no way affected the question of taxability in the hands of the recipient. The Government obviously has confused the character of the payment and its source. On the Government's argument a simple legacy

of $5,000, which is unquestionably exempted by Section 213(b)(3), would be income to the legatee if the executor should happen to have income available from which to pay it, and paid it out of such income.

The Circuit Court of Appeals and the Board of Tax Appeals recognized the distinction between the character of this legacy and the fund from which it might be paid and so refused to adopt the Government's fallacy.

II.

Section 219 of the Revenue Act of 1921 does not support the Government's argument.

Subdivision (a) of Section 219 provides that the income tax shall apply to the income of estates including income which is to be distributed periodically. Subdivision (c) of that Section provides that the executor shall pay the tax upon the net income of the estate, but that in computing the net all income which is to be distributed periodically may be deducted by the executor in his return. And subdivision (d) provides that income which is to be distributed periodically and deducted by the executor shall be taxed to the distributee.

The Government assumes the entire case on page 10 of its brief and asserts that a payment of this annuity out of income "is of course a periodic distribution" of income, and erroneously concludes that if the income is not taxed to the annuitant then it will escape taxation. This argument ignores the essential point in the case, namely, that each $5,000 as and when received by the annuitant is in no sense income but is a specific bequest of a sum certain payable without contingency irrespective of whether or not the executor has income. Under such an argument it would follow that if a specific legacy of $5,000 were paid out of funds which are income to the executor, the legatee must pay tax on

the funds received by him. But the executor and the legatee (in this case the annuitant) are two distinct taxable entities under the law. Regardless of whether the funds paid over are or are not income to the executor, the controlling fact persists that any and all payments made to the annuitant constitute a charge on capital, as in the case of an ordinary legatee. Since they are a charge on capital, the executors may claim no deduction as an offset against current income in respect of these payments. Section 219 in providing that income distributed periodically may be deducted by the executor, obviously contemplates income which is taxable to the recipient, for the reason for the deduction is to relieve the executor of tax only when a tax is collected from the recipient and thus avoid taxing the same income twice. This is in harmony with Section 213(b)(3) whereas the Government's construction not only conflicts with that section but also results in the taxation of receipts which are not income in any sense. In this case all of the estate, including the income therefrom, must be held for the Home corporation, subject to the payment of this and other annuities. The Home is exempt by law as a charity. Therefore, failure to collect a tax from this annuitant will not result in any loss of revenue to which the Government would otherwise have been entitled.

III.

Irwin v. *Gavit*, 268 U. S. 161, and *Beatty* v. *Heiner*, 276 U. S. 598, are distinguishable.

In those cases payments were directed to be made from income of trust funds and were limited to such income. In this case there is no trust fund and no gift of income as such; the annuity is a charge against principal and must be paid in any event, the executors being given power to sell corpus for its payment.

IV.

There is no question involved justifying the granting of a writ of certiorari.

We have been unable to discover any case similar to this pending anywhere except that there are cases of other annuitants under this particular will which are identical with the instant case. The decisions below did not erroneously construe the statute, they are not in conflict with any decisions of this Court, and no Federal question of general importance is presented. They properly construed the will under the laws of New York in giving effect to its provisions.

CONCLUSION.

Accordingly the petition for a writ of certiorari should be denied.

Respectfully submitted,

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